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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND THE ARIZONA)	
RULES OF CIVIL APPELLATE)	Supreme Court No. R-14-_____
PROCEDURE)	
)	With Requests to Allow
)	Late Filing and a
)	Modified Comment Period
_____)	

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts (“AOC”), petitions this Court to amend the Arizona Rules of Civil Appellate Procedure (“ARCAP”) by adopting the proposed revisions discussed in this petition and as shown in the attached Appendix. Because the proposed revisions affect *all* of the current civil appellate rules, the petition presents these revisions as a new set of rules rather than as individual rule amendments. This petition anticipates a series of conforming technical amendments to other rules of procedure that currently refer to (and incorporate by reference) specific provisions of the current ARCAP, as described in Section VI of this petition.

I. Request for Late Filing. Supreme Court Rule 28(A)(1) provides that a rule petition must be filed by January 10 for the petition to be considered by the Court at its annual rules agenda in late August or early September. Petitioner requests the Court's consideration of this petition during its 2014 rules agenda despite this late filing, because the petition's scope and the need to obtain feedback on preliminary drafts precluded its filing by the usual January 10 deadline.

II. Background and Purpose of the Proposed Rules. The proposed rules incorporate the most extensive revisions to the ARCAP since its adoption in 1978. The proposed rules include not only stylistic revisions but also substantive changes, as shown in the attached Appendix and as discussed below.

III. Preliminary Comments. Before filing this petition, Petitioner sought comments on earlier drafts from the court community and from practitioners. Among others, judges, clerks, and staff attorneys of Division One and Division Two participated in the process of reviewing and revising those drafts, as did the Supreme Court clerk and staff attorneys. In addition, the State Bar's Civil Practice and Procedure Committee established an ad hoc workgroup to provide suggestions. This workgroup included not only members of that Committee, but also appellate practitioners specially invited to participate in the group's discussions. During January and February, this group of experienced appellate jurists and litigators met six times, usually for three-hour sessions, to review multiple drafts that reflected

successive comments from group members and other appellate stakeholders. Petitioner also sought out and received comments from attorneys with expertise in election law concerning the rule on expedited election appeals.

IV. Restyling changes. The proposed amendments include stylistic revisions intended to make the appellate rules more comprehensible and user-friendly. The elements of restyling include:

- Using informative headings and subheadings
- Breaking up long sentences, or collapsing them into fewer words
- Converting a lengthy rule into shorter subparts, which makes it easier to find particular provisions
- Using lists
- Avoiding repetition
- Using “plain English”
- Stating things in a positive form
- Avoiding legal jargon and ambiguous terminology, including the word “shall” (which the proposed rules replace with “must,” “may,” “should,” or “will,” depending on the context.)¹

Several other restyling items are noteworthy.

¹ Please see [“Lessons in Drafting from the New Federal Rules of Civil Procedure”](#) by Joseph Kimble, The Scribes Journal of Legal Writing, 2008-2009.

(a) The stylistic revisions generally follow the conventions recommended in Bryan Garner’s *Guidelines for Drafting and Editing Court Rules* (1996), which were also followed in stylistic revisions of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. In several instances, the proposed changes to ARCAP follow the format and text of the Federal Rules of Appellate Procedure (“FRAP”), which were restyled in 1998.

(b) To the extent possible, and to facilitate legal research, the restyled rules keep the same rule numbers. However, to make individual rules easier to find, the proposed revisions include a table of contents that has six distinct headings, which break up the current monolithic table of contents into more easily digestible parts. In addition, sections within some rules are re-arranged to achieve greater clarity and simplicity.

(c) The proposed rules include updates that reflect current appellate practices and the courts’ increasing use of contemporary technology, particularly electronic filing. One example of modernizing the rules concerns a dozen references in the current rules to “monofaced typeface.” This typeface is associated with documents produced by typewriters, it is almost as anachronistic in current legal practice as quill pens, and the proposed rules no longer include references to monospaced typeface.

(d) The proposed rules have consistent formatting and nomenclature. For example, the proposed rules refer only to “appellate clerk” rather than variously using “appellate clerk,” “appellate court clerk,” or “clerk of the appellate court.” The proposed rules also expressly distinguish between functions performed by appellate clerks and those performed by superior court clerks.

V. Substantive Changes. The length of this petition does not permit a detailed explanation of each proposed substantive change in the ARCAP, but major changes are described in a “comparison version” that is in the Appendix accompanying this petition. Described below are some significant and illustrative changes.

(1) Elimination of Most Comments: The proposed amendments delete most of the comments in the existing rules because they are largely unnecessary. When an existing comment includes a substantive component, an effort was made to include the substance in the rule itself. *See, e.g.*, proposed Rule 16(b)(3) (requiring amicus curiae disclosure of sponsoring entities). The proposed rules retain a handful of comments that provide users with essential information or practical guidance.

The proposed rules add a new “prefatory comment” that is similar to the prefatory comment added to the Arizona Rules of Evidence as part of the 2012 amendments to those rules, and which is similar to the introduction included with

the 2013 Justice Court Rules of Civil Procedure. In five short paragraphs, ARCAP's prefatory comment

- identifies significant reasons for these revisions;
- describes the two general types of changes (stylistic and substantive);
- provides direction on the use of prior case law; and
- provides guidance for using comments to the prior versions.

(2) **Rule 1 (“Title and Application”):** Proposed Rule 1 includes a new sentence stating: “These Rules should be used and interpreted to achieve the just, speedy, and inexpensive resolution of civil appeals.” This provision reflects ARCAP's core judicial philosophy and a chief canon that should govern the Rules' construction. Similar language, included for a similar purpose, is in Rule 1 of the Arizona Rules of Civil Procedure and Rule 26 of the Arizona Rules of the Supreme Court.

(3) **Rule 2 (“Definitions”):** Rule 2 currently provides only four definitions (“decision,” “upon stipulation,” “upon motion,” and “judgment.”) Proposed Rule 2 retains those definitions (with some stylistic revisions), and adds several additional terms frequently used in the appellate rules: “appeal,” “appellate clerk,” “appellate court,” “appellant,” “appellee,” “party,” and “person.”

(4) **Rule 4(d) (“Filing with the Appellate Clerk”):** One topic frequently raised by preliminary comments was whether appellate clerks should have the

authority to reject filings. Every Arizona appellate court appears to have a policy permitting its clerk to reject a filing if it does not comply with certain procedural requirements. *See, e.g.*, Supreme Court Administrative Order No. 2001-53 (which gives the Supreme Court clerk authority to reject filings under specified circumstances). On the other hand, many appellate litigators have stories of filings rejected by the clerk for technical reasons, sometimes on the eve of a filing deadline; and they have suggested that the court, rather than the clerk, should make decisions to reject filings. Based on feedback from judges, court personnel and practitioners, proposed Rule 4(d) adopts this latter approach, and provides that “[t]he appellate clerk may not refuse to accept a document because it does not comply with these Rules.” The proposed rule, however, also states that if a filing fails to comply with the rules, “an appellate court may enter an appropriate order, including one that requires corrective action or imposes a sanction.”

(5) ***Rules 4.1 and 4.2 (“Paper Filing” and “Electronic Filing”):*** Among the most important substantive revisions to ARCAP are two new rules—Rules 4.1 and 4.2—that distinguish between, and provide requirements for, paper and electronic filing. These two rules incorporate many of the elements of Supreme Court Administrative Order No. 2012-02, but they also do more:

- (1) Rule 4.2 incorporates electronic filing practices for Division Two;

- (2) Rule 4.2(b) includes a cross-reference to proposed Rule 32, which contains internet addresses for electronic filing portals; and
- (3) Rules 4.2(d) and (e) contain, respectively, definitions and directions for use of bookmarks and hyperlinks.

Different requirements for electronic and paper documents are included in other rules. For example, because appellate clerks now scan and preserve paper briefs as electronic records, the proposed rules delete requirements for different color brief covers. Similarly, the proposed rules no longer require the use of two-prong fasteners to bind oversized appendices (currently required under Rule 23(c)) because they make it more difficult for appellate clerks to scan documents.

(6) Rule 10 (Currently, “Bond for Costs on Appeal” – Proposed, “Appeals in Expedited Election Matters”): Currently, Rule 10 requires an appellant to post a \$500 cost bond on appeal. Comments on earlier ARCAP drafts showed little support for this requirement. Some comments characterize the current rule as impeding access to appellate courts, and suggest that cost bonds may impose an unfair burden on litigants who have modest financial resources. (See further Rule Petition R-13-0044’s proposal to delete portions of Rule 67 of the Arizona Rules of Civil Procedure, which requires certain plaintiffs to post security for litigation costs.) Others contend that Rule 10 is unnecessary because taxable costs on appeal are generally modest, and typically, appellants are

sufficiently solvent to pay those costs without the need for a bond. Consideration was given to replacing Rule 10 with a provision, similar to FRAP Rule 7, which would allow discretionary imposition of a cost bond, but this approach was ultimately rejected because of a concern that such a rule might lead to a proliferation of motions requesting cost bonds, rather than reducing their use. Accordingly, the proposed amendments eliminate the requirements of current Rule 10.

To fill the “gap” created by the elimination of current Rule 10, current Rule 8.1 (“appeals in expedited election matters”) is now proposed Rule 10. The rule on election appeals fits neatly into the sequence after Rule 8 (“Appeal and Cross-Appeal – How Taken”) and Rule 9 (“Appeal and Cross-Appeal – When Taken”). Petitioner believes that renumbering this rule will not seriously disrupt efforts to research prior case law under the rule because only a few reported opinions currently appear in Rule 8.1’s annotations.

(7) ***Rule 11 and Rule 11.1 (“The Record on Appeal” and “Transmitting the Record to the Appellate Court”):*** Rule 11 is one of the most lengthy and difficult ARCAP rules to navigate and understand. The proposed changes include extensive stylistic revisions to make this rule’s requirements easier to find and comprehend. In addition, as was done in the FRAP, the proposed amendments to

ARCAP divide the process of preparing, and transmitting, the record into two consecutive rules.

Proposed Rule 11 benefits not only from a reduction in length, but also from the addition of multiple section headings and paragraph headings. For example, Rule 11(c) has the title, “Appellant’s Duty to Order Transcripts.” There are six paragraph headings within this section: (1) What to Order; (2) When to Order; (3) Complete Transcript; (4) Partial Transcript; (5) No Transcripts Ordered; and (6) Payment. Rule 11(f) permits submission of an audio or video recording of trial court proceedings, if it “will serve the interests of expediency and economy” and if it does not exceed 30 minutes, and only with permission of the appellate court. Proposed Rule 11.1 addresses preparation of the superior court clerk’s index of the record, court-to-court electronic transmission of the record on appeal, and the filing of transcripts.

(8) ***Rule 13.1 (“Appendix”)***: Current ARCAP Rules 13 and 23 refer to an appendix, but these rules provide only limited guidance about its form or content, especially if it is filed electronically. To address this deficiency in the current rules, proposed Rule 13.1 deals exclusively with appendices, and, among other things, includes separate requirements for appendices filed electronically or in paper.

(9) Rule 28 (“Decisions; Publication of Opinions”): There are two issues regarding Rule 28 that this petition’s proposed amendments do not resolve.

First, while proposed Rule 28 includes extensive stylistic revisions, Petitioner is not proposing corresponding revisions for Rule 111 of the Rules of the Arizona Supreme Court, which contains provisions that are similar to those in Rule 28. Second, if the Court adopts the rule amendments in R-14-0004, it would affect the content of Petitioner’s proposed Rule 28(f). (R-14-0004’s amendments to Rule 28(f), and to other sets of rules, would allow citation to unpublished decisions for their persuasive value.) If the Court decides to adopt the substantive changes contained in R-14-0004, an alternative to that petition’s suggested text for Rule 28(f) is included for the Court’s consideration in the attached Appendix; the alternative version is more stylistically compatible with the proposed ARCAP.

(10) Rule 30 (“Arizona Appellate Settlement Conference Program”): Current Rule 30 is the longest of any of the current ARCAP rules, taking up about three pages in the 2014 volume of the Arizona Rules of Court. Petitioner believes that many of Rule 30’s procedural details concern routine program administration, and that these details do not need to be in an appellate rule. The current rule also includes detailed provisions about how Division One and Division Two administer their settlement programs differently. Proposed Rule 30 is considerably shorter than the current rule. The proposed rule includes a brief introduction to the

appellate settlement program. It then states that the Court of Appeals will provide details of its settlement program, which may differ between divisions, in a policy that will be available on each division's website, and at the appellate clerks' offices. This approach gives each division the flexibility to modify details of their respective settlement conference programs without the need for making formal amendments to Rule 30.

(11) Rule 32 (“Websites, Filing Portals, and Forms”): This rule is new. Section (a) of the rule provides website addresses for the Arizona Supreme Court, and for Divisions One and Two. Section (b) provides the addresses of electronic filing portals for Arizona appellate courts. Section (c) includes a list of forms that appear in the appendix to the ARCAP, such as a notice of appeal, caption templates, and a certificate of compliance. Section (d) authorizes the Administrative Director of the AOC to:

(1) Add, delete, or change addresses of appellate websites listed in Rule 32(a) and filing portals listed in Rule 32(b), as necessary.

(2) Modify forms listed in Rule 32(c) in response to changes in state laws or procedures, to make other necessary administrative amendments or technical corrections, or to add or delete forms, as appropriate.

This proposed rule may be especially useful to self-represented litigants and attorneys who handle appeals infrequently. In addition, giving the Administrative Director of the AOC authority to modify forms and update website addresses

provides a simple means for revising the forms and information, as future needs arise, without the necessity of formally amending the rules.

VI. Request to Amend Other Rules. Eight sets of Arizona rules of procedure—including the Rules of the Arizona Supreme Court, the Arizona Rules of Procedure for Special Actions, and Arizona procedural rules governing civil, criminal, family law, and juvenile actions—refer to specific ARCAP rules or subparts of those rules. Some of these references will require amendment if this Court adopts the proposed revisions to the ARCAP, because several of the proposed ARCAP rules have new numbers (Rules 4.1, 4.2, 10, 11.1, 13.1, and 32), while others have new section designations within an existing rule number. Rather than submitting these technical amendments with this petition, Petitioner anticipates filing those amendments with the amended petition (discussed in the next section of this petition) to assure that they include any additional, proposed revisions to the ARCAP.

VII. Request for a Modified Comment Period. Petitioner acknowledges that this petition proposes a large number of changes to the ARCAP. Although Petitioner has already received extensive comments that are incorporated in the proposed revisions, additional public comments may address items that this petition overlooks, or may suggest other changes that improve the proposed ARCAP amendments. Petitioner therefore requests that the Court allow a

modified comment period to accommodate the filing of an amended petition after an initial round of public comments. Petitioner suggests the following dates:

April 28, 2014:	First round of comments due
May 20, 2014:	Amended petition due
June 13, 2014:	Second round of comments due
July 7, 2014:	Reply due

VIII. Conclusion. Petitioner therefore requests that the Court open this petition for comments during the modified periods described above.

RESPECTFULLY SUBMITTED this 21st day of March, 2014

By _____
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